SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 227

ALBERT R. AVELLA, JOHN EDWARD GALLUCCI, ROBERT TOSCANI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MITCHELL MELNIKOFF,
On the Petition.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No.

ALBERT R. AVELLA, JOHN EDWARD GALLUCCI,
ROBERT TOSCANI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Albert R. Avella, John Edward Gallucci and Robert Toscani pray that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 27, 1968.

Citation to Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is unreported but is attached hereto as part of the Appendix.

Jurisdiction

The judgment of the United States Court of Appeals was entered on May 27, 1968. No Petition for Rehearing was filed. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C.A. 1254.

Statement of the Case

At a jury trial in the United States District Court for the District of New Jersey, the Petitioners were convicted of possession of stolen goods from an interstate shipment in violation of 18 U.S.C. 659.

On October 14, 1966 at approximately noon the Petitioners were arrested in a driveway adjacent to 205-209 Passaic Street, Garfield, N. J. The arrest was made by agents of the Federal Bureau of Investigation (hereinafter F.B.I.) who had neither an arrest nor a search warrant. When the F.B.I. agents made the arrest, they searched a closed body van type U-Haul truck which was parked at the rear end of the driveway. The truck contained Planter's Peanuts and Planter's Peanut Oil which the agents seized.

The Petitioners filed a timely motion to suppress as evidence the contents of the truck. Because the arrest and seizure were made with neither an arrest warrant nor a search warrant, the Government conceded at the suppression hearing that it had the burden to establish that the search and the seizure were not in violation of the Petitioners' Fourth Amendment rights.

Agent Pirog was the only Government witness at the motion to suppress evidence. The substance of his testimony was: that at approximately 10:00 A.M. on October 14, 1966 one of his subordinate F.B.I. agents received a telephone "tip" from an informant. Over the objection

of defense counsel and notwithstanding that agent Pirog had never seen or talked with the informant, agent Pirog characterized him as a reliable informant and as one who had in the past provided reliable information.

As a result of the information communicated to agent Pirog by his subordinate, agent Pirog and three other agents commenced a mobile surveillance on Passaic Street in Garfield, N. J. at approximately 11:00 A.M. on October 14, 1966. While conducting that surveillance, he observed a U-Haul closed body van truck driven by Robert Toscani travel in a westerly direction on Passaic Street, slow down near 205-209 Passaic Street and make a "K-type" turn and begin backing up into the driveway. He observed Gallucci and Avella guiding in or directing the backing up of the truck. Thereafter one of the Petitioners closed the metal gates to the entrance of the driveway. In the continuing surveillance agent Pirog observed that the doors of the van were opened and he saw legs moving from the rear of the truck to the front of the garage. Subsequently the Petitioners walked out of the driveway, closed the gates behind them and walked into the building adjacent to the driveway. The front area of the building was a retail store which sells lamps and lamp shades. Gallucci remained on the store premises only a few moments and then came out on the sidewalk. At that juncture, an F.B.I. agent detained Gallucci on the sidewalk while the other agents ran through the lamp store, through the area of a greeting-card manufacturing business where women were assembling greeting cards, through a storage area of a business which rebuilds air conditioners, then through a rear door which exits on the back end of the driveway and came out at the rear end of the driveway. Agent Pirog and the other agents arrested Toscani and Avella who were standing at the rear of the driveway.

At the motion to suppress evidence, defense counsel argued: (1) that there was no probable cause for the agents to invade the greeting card premises, the air conditioning premises nor the private area at the rear end of the driveway; (2) that all the testimony of agent Pirog should have been stricken because his testimony was hearsay on hearsay; and (3) that agent Pirog's characterization of the informant as reliable was groundless because not only did he not know the informant or receive the information from the informant, but he did not particularize or specify the prior occasions when the so-called reliable informant had provided information which in the past proved reliable and which resulted in arrests and convictions. The Judge who heard the motion overruled defense counsel's objections and stated that the test of whether an informant is reliable is measured by what the subsequent search discloses. The Court remarked that since the Petitioners were found near the stolen goods the information provided by the informant must have been reliable. In effect the Court ruled that the agents observed a crime being committed in their presence and, consequently, did not require a search warrant to search the truck notwithstanding that there was testimony at the suppression hearing that the F.B.I. agents (1) had blocked the driveway with one of their cars; (2) could have removed the ignition key from the truck to keep it from being moved; and (3) that the United States Commissioner or other judicial officer who could have issued a search or arrest warrant was within a twenty-minute drive from the premises.

At the trial, defense counsel made a motion to direct the United States Attorney's office to disclose to defense counsel the names and addresses of witnesses, statements, testimony, photographs and other material evidence avail-

able or contained in the Government's file which might be favorable to the defendants. The trial court denied defense counsel's motion.

Some years earlier, petitioner Avella had been convicted in a State court of gambling offenses. In the Government's case in chief, the Assistant United States Attorney attempted to establish through the testimony of one of the arresting F.B.I. agents that the agent had previously known Avella. Although defense counsel's objection was sustained, defense counsel moved for a mistrial, which was denied.

Each of the Petitioners testified in his own defense. When petitioner, Avella, was cross-examined by the Government attorney, Avella admitted that he had previously been convicted of gambling offenses. Nevertheless, the Government marked and submitted into evidence the certified copies of those State court convictions. During that cross-examination, the Assistant United States Attorney attempted to characterize petitioner Avella as a "mug", a "pug" and a "thug". Avella had testified that he was employed as a manager of a cocktail lounge. The prosecution attempted to insinuate that Avella was really the lounge's "bouncer" and asked Avella whether he had once been a prize fighter. In the same cross-examination, the Government tried to establish that Avella had a considerable amount of money on his person when he was arrested. The trial court permitted the cross-examination of Avella's employment status at the cocktail lounge but sustained defense counsel's objection to the question of the amount of money on Avella's person when he was arrested.

Constitutional Provisions Involved

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S.C.A. Const. Amend. 4.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S.C.A. Const. Amend. 6.

Questions Presented

I. Was the search, seizure and introduction into evidence against the Petitioners of the contents of the truck in the driveway made in violation of the Fourth Amendment rights of the Petitioners?

II. Were the Petitioners denied a fair trial by:

(a) the refusal of the trial court to grant the motion of the Petitioners for disclosure of evidence favorable to them in the Government's file?

(b) the Government's introduction into evidence of the certified copies of petitioner Avella's previous State court convictions for gambling offenses?

(c) the introduction of evidence concerning Petitioners' character on the Government's case in chief?

(d) the Government's cross-examination of petitioner Avella in which it implied he was a "mug", a "thug" and a "pug"?

Reasons for Granting the Writ

I

Immediately before the arrest of the Petitioners the F.B.I. agents had them under observation for approximately one hour. The actions and conduct of the Petitioners were neutral, innocent and non-criminal. There was nothing that the F.B.I. agents observed which would induce them or any prudent, reasonable person to believe that a crime was taking place in their presence or that the Petitioners were committing a crime. *Brinegar* v. *United States,* 338 U. S. 160, 175-176, 69 S. Ct. 1302, 1310-1311, 93 L. Ed. 1879; *Henry* v. *United States,* 361 U. S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 2d 134; *Beck* v. *State of Ohio,* 379 U. S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142. Accepting all of the Government's testimony as true, the agents saw: one of the Petitioners driving a truck in broad daylight, come to a halt in a driveway in a commercial area and then with the assistance of the other two Petitioners back it up into the driveway. The gate to the driveway was then closed and the rear doors in the truck were open concealing from the view of anybody outside the driveway what was taking place in the back of the driveway. The Federal agents testified that they only observed legs and feet moving from the rear of the truck to the garage in the rear of the driveway. Consequently the agents had no way of knowing what the contents of the truck were before the agents burst into and invaded the adjacent building consisting of the lamp store and the other areas of the building, all of which were not open to the public, and which consisted of a greeting-card manufacturing business, an air-conditioner repair business and the rear part of the driveway.

The demeanor and appearance of the Petitioners was not secretive nor surreptitious nor stealthy, nor was there

anything suspicious about a truck being backed into a driveway. Moreover, notwithstanding that the Federal agent who testified at the pretrial suppression motion was the only Government witness and he testified that he had no previous dealings with the informant, that agent gratuitously referred to the informant as reliable although the agent did not testify with particularity and specificity to the information disclosed by the informant. *McCray* v. *State of Illinois,* 386 U. S. 300, 87 S. Ct. 1056 (1967).

Additionally, the Government's own testimony showed that the agents had blocked the driveway with one of their cars thus rendering the truck immobile, and that they also detained the Petitioners. Consequently, the agents could have sought to obtain a search warrant from the United States Commissioner or any other judicial officer, all of whom were only twenty minutes away from the place of the arrest. *United States* v. *Jeffers,* 342 U. S. 48, 51, 72 S. Ct. 93, 96 L. Ed. 59 (1961).

II (a)

At the trial defense counsel applied to the Court to instruct and direct the Government to disclose to defense counsel the names and addresses of witnesses, statements, testimony, photographs and other material evidence available or contained in the Government's file, any of which might be favorable to the Petitioners or could assist them in their defense. The trial court denied the motion. The Court ruled that it would not permit defense counsel to examine the Government file and insisted that before the Government disclosed any information in its file to defense counsel, defense counsel would have to be specific as to what particular information it was seeking. Consequently the trial court imposed an impossible burden on defense counsel. Even if there was no attempt on

the part of the Government to suppress evidence favorable to the Petitioners, it is argued that if defense counsel had an opportunity to examine and make discovery into the Government's file it would have been able to more effectively cross-examine the Government's witnesses, establish the basis to impeach or discredit the testimony of the Government witnesses and possibly lead to the discovery of information which could exonerate the Petitioners. See *Brady* v. *Maryland,* 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Giles* v. *Maryland,* 386 U. S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967); *Jencks* v. *United States,* 353 U. S. 675, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957); *State of New Jersey* v. *Hunt,* 25 N. J. 514, 138 A. 2d 1 (1958); *Application of Kapatos,* 208 F. Supp. 883 (S. D. N. Y. 1962); *United States* v. *Wilkins,* 326 F. 2d 135 (2 Cir. 1964); *Suppression of Evidence Favorable to an Accused,* 34 F. R. D. 87.

II (b)

When the Government cross-examined the petitioner, Avella, it asked him whether he had previously been convicted of any crime. The Government well knew that Avella had been convicted some years earlier in a State Court of gambling offenses. In response to the question by the Government attorney, Avella admitted that he had been convicted and he enumerated the gambling offenses for which he had been convicted. Nevertheless, the Government marked and submitted into evidence the certified copies of his convictions. The certified copies enumerated the convictions which Avella had admitted in the cross examination.

Petitioner, Avella, contends that the admission into the evidence and the marking of the certified copies of his conviction unduly prejudiced his case and deprived him

of a fair trial. It is conceded that once a defendant takes the stand and testifies in his own defense, the Government is entitled to inquire whether he has any previous convictions. However, when a defendant gives a true and responsive answer to the question of whether he has previously been convicted, under those circumstances he is deprived of a fair trial by the admission into evidence of the record of his conviction because that record is taken into the jury room during its deliberation and is a constant reminder to the jury of the defendant's previous violation of the law. The only reason any inquiry at all is permitted as to defendant's previous conviction of crime is so the jury may have the opportunity to weigh and consider whether based upon his previous conviction some or all of his testimony may be disregarded by it. Otherwise, the matter of his previous conviction has no place in a trial and certainly the jury should not be constantly reminded of it by taking into the jury room a certified copy of the record of his previous conviction.

II (c)

In the Government's case in chief, it asked one of the F.B.I. agents whether he had ever seen any of the defendants before and knew them by name. The agent replied that he had, and the next question of the Government was: "Tell us about that". Defense counsel's objection was sustained, but his motion for a mistrial was denied.

The clear purpose of the question was to establish that the petitioners were known to the F.B.I. agents, the inference being that petitioners had been suspects in other crimes or were under constant surveillance of the F.B.I. because they were "bad men". The Government attorney knew that on his case in chief he could not introduce

evidence of prior bad conduct or evidence of character. *Greer* v. *United States,* 254 U. S. 559, 38 S. Ct. 209, 62 L. Ed. 469; *United States* v. *James,* 208 F. 2d 125 (2d Cir. 1953). See also *Michelson* v. *United States,* 335 U. S. 469 (1948). It was highly improper for the Government to raise the question of the character of the Petitioners in its case in chief. *United States* v. *Lefkowitz,* 248 F. 2d 310 (C. A. 2d Cir. 1960). In *United States* v. *Pickens,* 148 F. Supp. 652, aff'd 216 F. 2d 438, the Court found that "Prejudicial references to past crimes or other matters tending to besmirch the character of the defendant, at least until he places his character in issue, deprives the defendant of a fair trial".

II (d)

In cross-examination the petitioner, Avella, testified that he was the manager of a cocktail lounge. The Government, however, sought to characterize his employment as the club bouncer. In follow-up questions the Government attorney sought to establish that Avella was really employed as the "club bouncer" and that Avella bragged about his prowess as a fighter. Over the objection of defense counsel, the Government elicited that Avella had been both an amateur and professional prize fighter. However, in the same cross-examination, the trial court did sustain defense counsel's objection to the Prosecutor's question of how much money Avella had on him when he was arrested.

The clear import of the aforementioned line of questioning was to prejudice the Petitioner and to create in the minds of the jury that Avella was a "mug", a "pug" and a "thug". See *United States* v. *Kravitz,* 281 F. 2d 581 (3rd Cir. 1960), Cert. denied, 81 S. Ct. 459, 364 U. S. 941, 5 L. ed. 2d 372. See *Schaefer* v. *United States,* 265 F. 2d 750 (8th Cir. 1959), Cert. denied, 80 S. Ct. 97, 361 U. S. 844, 4 L. ed. 2d 82. *Cf. Thurman* v. *United States,* 316 F. 2d 205 (9th Cir. 1963).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD M. GLASSNER,
Attorney for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 16832, 16833, 16834

UNITED STATES OF AMERICA

v.

ALBERT R. AVELLA, Appellant in No. 16832
JOHN EDWARD GALLUCCI, Appellant in No. 16833
ROBERT TOSCANI, Appellant in No. 16834

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NEWARK)

Argued May 9, 1968
Before McLAUGHLIN, FREEDMAN and VAN DUSEN,
Circuit Judges

OPINION OF THE COURT

(Filed May 27, 1968)

PER CURIAM:

We are satisfied that the judgments of conviction on these appeals were properly entered.

Brady v. Maryland, 373 U. S. 83 (1963) does not authorize a defendant to obtain complete discovery of what-

ever records the government may have without any indication that they contain anything favorable to him which has been withheld. See North American Rockwell Corporation v. N.L.R.B., 389 F. 2d 866, 873-4 (9 Cir. 1968).

The motion by the appellants to suppress the evidence was properly denied under the detailed circumstances which were presented to the court. United States v. Konigsberg, 336 F. 2d 844, 847-8 (3 Cir. 1964).

Comments made by the government counsel, some of which were unobjected to, were not such as to require a new trial. The objection to the wheeling in of the sequestered material during the course of the trial by the court officials and the effort to have this declared ground for mistrial is frivolous.

The judgments will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,832

UNITED STATES OF AMERICA

vs.

ALBERT R. AVELLA
JOHN EDWARD GALLUCCI
ROBERT TOSCANI
ALBERT R. AVELLA,
Appellant

(D. C. Criminal No. 436-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, FREEDMAN and VAN DUSEN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Exhibit B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 15; 1967, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

May 27, 1968

APPENDIX B (Continued)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,833

UNITED STATES OF AMERICA

vs.

ALBERT R. AVELLA
JOHN EDWARD GALLUCCI
ROBERT TOSCANI
JOHN EDWARD GALLUCCI
Appellant

(D. C. Criminal No. 436-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, FREEDMAN and VAN DUSEN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Exhibit B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 15, 1967, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

May 27, 1968

APPENDIX B (Concluded)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,834

UNITED STATES OF AMERICA

vs.

ALBERT R. AVELLA
JOHN EDWARD GALLUCCI
ROBERT TOSCANI
ROBERT TOSCANI,

Appellant

(D. C. Criminal No. 436-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, FREEDMAN and VAN DUSEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Exhibit B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 15, 1967, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

May 27, 1968